STATE OF MICHIGAN

COURT OF APPEALS

ROBERT V. KOSKY and LYNN M. KOSKY, Plaintiffs/Counter-Defendants-Appellants,	UNPUBLISHED May 20, 2010
v	No. 293558 Iron Circuit Court
MARK BYCZEK and KELLY BYCZEK, Defendants/Counter-Plaintiffs-Appellees.	LC No. 08-003883-CH

Before: WHITBECK, P.J., and SAWYER and BORRELLO, JJ.

PER CURIAM.

Plaintiffs appeal as of right the judgment for defendants granting quiet title to a strip of land along the border of the parties' properties. We affirm.

I

In 1947, Peter and Hilma Poutiainen conveyed one parcel of land (hereinafter "the Byczek parcel") to Hjalmer Kosky and his wife Saima, and another parcel (hereinafter "the Kosky parcel" to Hjalmer's brother John Kosky, and John's wife Tuovi. The parcels are bordered on the south by Sunset Lake, and the Byczek parcel is immediately to the east of the Kosky parcel.

John and Tuovi Kosky conveyed the Kosky parcel to John's brother J. Arthur Kosky and his wife Adeline. The property then passed to their daughter Jeanette, through conveyances that are not part of the record, and then in 2003 to Jeanette's son, plaintiff Robert Kosky, and his wife, plaintiff Lynn Kosky. Hjalmer Kosky left the Byczek parcel to his stepdaughter Corrine, who left it to her sister Lempi Huska. John and Lempi Huska conveyed it to the John Huska Family Revocable Trust in 1999.

In spring 2005, Lempi Huska was preparing to sell the Byczek parcel to defendants. Yooper Land Realty Co., which was handling the sale, hired Gary Pisoni to survey the property. Pisoni found pipes marking the eastern corners of the Byczek parcel, the western corners of the Kosky parcel, and the southwest corner of the Byczek parcel (i.e., the southeast corner of the Kosky parcel). All of the pipes Pisoni found were about ten feet to the west of the lines as described in the deeds. Pisoni found no marking for the northwest corner of the Byczek parcel,

but set a pin at a point calculated based on the five pipes he found. That pin was also set about ten feet west of the deed line.

Later surveys by Pisoni revealed that the lines of occupancy between the properties immediately to the west of the Byczek and Kosky parcels were likewise some feet west of the deed lines. Some of the properties had structures built over the deed lines, but Kosky found pipes and, in one case, a fence, marking boundaries west of the deed lines. Just before the 2005 sale of the Byczek parcel, Yooper Land presented plaintiffs with a boundary line agreement, signed by Lempi Huska, which would fix the boundary between the properties at the monumented line rather than the deed line. Plaintiffs refused to sign the agreement, and the Byczek parcel was sold without a resolution to the issue.[1]

At first, both parties appeared to recognize a different line as the boundary. Robert Kosky said that he would mow and take care of the land up to the deed line, while defendants mowed up to the monumented line. In 2007, plaintiffs erected a fence on the deed line. According to Robert Kosky, defendants were planning to rent the property, and plaintiffs wanted the renters to know where the property line was. Defendants cut down the fence, and placed several large items of personal property on the disputed strip of land. Plaintiffs testified that the driveway they were accustomed to using (which was partly located within the disputed strip) was blocked by defendants.

Plaintiffs sued for ejectment and damages for trespass and conversion. Defendants countersued for quiet title to the strip, asking the court to set the boundary at the monumented line. Following a bench trial, the trial court found for defendants on their counterclaim to quiet title, and dismissed plaintiffs' claims. This appeal followed.

II

This Court reviews the factual findings of a trial court in a bench trial for clear error, and the court's conclusions of law de novo. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003). The trial court's holdings in a quiet title action are reviewed de novo. *Killips v Mannisto*, 244 Mich App 256, 258; 624 NW2d 224 (2001).

III

Plaintiffs first argue that the trial court erred in finding for defendants on the basis of acquiescence by intention to deed to a marked boundary. Although we agree with plaintiffs that this species of acquiescence is inapplicable to this case, we conclude that the trial court found for

[1] Following the surveys, there was litigation between plaintiffs and Jackson, their neighbor to the west, which was ultimately settled when Jackson quitclaimed to plaintiffs the strip of land between the deed line and the occupancy line. Jackson's neighbors to the west, the Ver Bruggens, likewise quitclaimed a strip of land to Jackson, and the Ver Bruggens' neighbors, the Carlsons, quitclaimed a strip to the Ver Bruggens.

defendants on a different theory of acquiescence and that it did not err in so finding. As such, we affirm.

Our courts have recognized three theories of acquiescence: acquiescence by agreement following a dispute, acquiescence for the statutory period, and acquiescence by intention to deed to a marked boundary. *Daley v Gruber*, 361 Mich 358, 363; 104 NW2d 807 (1960). There is no contention that acquiescence by agreement following a dispute is applicable here.

Plaintiffs assert that the trial court found for defendants based on acquiescence by intention to deed to a marked boundary. This theory provides that when owners of adjacent lots took from a common grantor, and the conveyances referred "'to a boundary line [the common grantor] had located on the ground, and deeds describing the tracts as certain lots in a block, the location was, irrespective of lapse of time, binding on the owners and those claiming under them.'" *Maes v Olmsted*, 247 Mich 180, 184; 225 NW 583 (1929), quoting *Herse v Questa*, 100 App Div NY 59; 91 Ny Supp 778 (1904).

We do not agree with plaintiffs' argument that evidence of the Kosky parcel's western border may not be used to find acquiescence with respect to the Kosky parcel's eastern border. Acquiescence by intention to deed to a marked boundary does not merely require a marked boundary inconsistent with some other boundary. It requires—indeed it "arises from"—a grantor's "intention to describe in the deed the boundary marked on the ground by a common grantor." *Daley*, 361 Mich at 363. Here, the deeds in question never referred to any marked boundaries. All deeds used as a line of reference "the West line of said Lot 4" or "the Northwest corner of said Lot 4" or similar references to legal, not marked, lines. The markings on the ground, i.e., the pipes in the ground, and the lines of occupancy on the Kosky-Jackson property line and on the eastern boundary of the Byczek parcel, were never referenced in the deeds. As such, we agree with plaintiffs that the trial court could not have used acquiescence by intention to deed to marked boundary in finding for defendants.

The language used by the trial court, however, strongly suggests that it found for defendants on the basis of acquiescence for the statutory period. "[W]here adjoining property owners acquiesce to a boundary line for at least fifteen years, that line becomes the actual boundary line." *Killips*, 244 Mich App at 260. Unlike in an adverse possession claim, the use of the property by the party claiming acquiescence need not be hostile. *Id.* Acquiescence of predecessors may be tacked on to the parties' time on the land. *Id.* The party claiming acquiescence has the burden to prove acquiescence by a preponderance of the evidence. *Id.*

The court said that the original monumented line "may have been inaccurate, but the court finds that it had been acquiesced in for a sufficient amount of time to fix the true line as a matter of fact and as a matter of law." The trial court noted that the marks on the ground indicating the monumented property lines had been there "for more than forty years." It also pointed out that the marks on the ground were consistent with where cottages had been built by plaintiffs' predecessors. The testimony indicated that the newer of the cottages had been built in 1980, more than twenty years before this dispute began.

In addition to the evidence cited by the court in its opinion, the record shows that some of the boundary lines (as used by the owners) to the west of the disputed boundary follow the monuments, not the legal description in the deed. One boundary has a fence, which is consistent

with the monuments, but not with the deed line. Further, several structures are built over deed lines, but consistent with monumented lines. All the deeds to the Kosky parcel recite that it is 50 feet in width. All of this evidence supported the trial court's finding that there was acquiescence for the statutory period. The trial court did not clearly err in so finding.

IV

Plaintiffs next argue that estoppel by deed should have prevented defendants' claim to quiet title. We disagree. As a general rule, estoppel by deed acts to estop a grantor, or one claiming under a grantor, from asserting a claim over the land conveyed away. *Pyne v Elliot*, 53 Mich App 419, 430; 220 NW2d 54 (1974). Our Supreme Court has said:

> Where one assumes by his deed to convey a title, and by any form of assurance obligates himself to protect the grantee in the enjoyment of that which the deed purports to give him, he will not be suffered afterwards to acquire or assert a title and turn his grantee over to a suit upon his covenants for redress. [*Smith v Williams*, 44 Mich 240, 242; 6 NW 662 (1880).]

The doctrine may be applied to deny a claim to an after-acquired claim to property. See, e.g., *Pyne*, 53 Mich App at 429. Estoppel by deed may also be used to deny the claim of a grantor's successor over land previously conveyed by the grantor. *Fahey v Marsh*, 40 Mich 236 (1879). However, neither situation is applicable here. Defendants (or their predecessors) did not convey away any interest in the Kosky parcel. Simply put, estoppel by deed only applies to deny claims by a grantor, or the grantor's successor, against the grantee, or the grantee's successor. Defendants and plaintiffs do not stand in a grantor-grantee relationship.

Finally, given our resolution of the above arguments, we reject plaintiffs' request for remand to determine damages due to their allegations of trespass and conversion.

Affirmed.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ Stephen L. Borrello